BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

In the Matter of	)	GC Docket No. 92-52
	)	
	)	
Reexamination of the Policy	)	
Statement on Comparative	)	
Broadcast Hearings	)	
	)	RM-7739
	)	RM-7740
	)	RM-7741

TO: The Commission

COMMENTS OF REED SMITH SHAW & McCLAY

James J. Freeman

REED SMITH SHAW & McCLAY
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-6100

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SUMMARY

The Commission's proposal to impose a three-year holding period on authorizations and permits obtained by decision or settlement in comparative proceedings finds little support in the public interest. In making this proposal the Commission has ignored all the detriments it previously found so persuasive in abolishing the old three-year rule. It does not even advert to these public interest considerations in proposing to impose a similar rule on new authorizations. Moreover, the proposal would make it very difficult for some applicants to arrange financing needed to settle cases or to construct stations. Most egregiously unfair is the impact such a proposal would have on existing contractual arrangements based on the current law. Under the Commission's proposal current agreements looking to the sale of the station after one year would be invalidated. No offsetting public interest benefit has been advanced which would warrant such retroactive application of a rule.

Indeed, the public interest benefit to be obtained from the proposed rule is slim to non-existent. There is currently no rule which requires an applicant to maintain its integration proposal for any period of time. Section 73.1620 of the rules merely requires an applicant to report changes so the Commission can determine whether those changes indicate that the original proposal was a misrepresentation. There is, moreover, no record evidence that parties obtaining licenses through settlements or

comparative hearings are transferring those licenses shortly after they receive them. In the absence of some indication of a problem, there is certainly little basis for imposing a harsh new rule.

The real impetus for this rule appears to be the Court's Decision in Bechtel v. FCC. Any desire by the Commission to justify to the Court its position would be more than adequately served by a much more narrowly drawn rule which would impose a requirement for maintenance of an integration proposal (a matter which is beyond the scope of the instant rulemaking) for a three-year period in cases in which the comparative status of the parties was the basis for a grant. There is no need to apply such a rule to authorizations obtained through settlement, authorizations obtained through disqualification of rival applicants, or to any cases which have already been completed.

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The firm of Reed, Smith, Shaw & McClay ("RSSM") represents parties who would be affected by the rules proposed in the Commission's Further Notice of Proposed Rulemaking ("Further Notice") in the above-captioned matter, and has represented clients in the past whose actions would have been affected by these proposals, had they then been in effect. Drawing on this past and current experience, we hereby submit the following comments in response to the questions the FCC has identified and the tentative views it has expressed.

I. INTRODUCTION

While at first glance the Commission's proposal might appear to be designed merely to reinforce its ability to continue to use the comparative criteria as significant decisional factors in

comparative cases, we believe that the practical aspects of the approach outlined in the Further Notice may have serious adverse consequences for new broadcast operators and for the initiation of new service to the public. Accordingly, we believe that the Commission should be extremely cautious in modifying its current rule providing for a one-year holding period where authorizations are granted through the comparative process. There is, after all, no factual record suggesting that new permittees immediately sell the stations they have obtained through the comparative process and are thereby undercutting the comparative criteria used in awarding broadcast authorizations. Further Notice, at n.4.

Nothing in the Further Notice, moreover, explains the need for revision of the Commission's prior judgment that the one-year holding period is an appropriate balance between permitting the free transferability of broadcast authorizations on the one hand, and assuring the integrity of the comparative process and promised service to the public on the other. Protecting the integrity of the comparative process was the sole reason for retaining the current one-year rule. Transfer of Broadcast Facilities, 52 RR 2d 1081, 1089-90 (1982), recon. in part, 99 FCC 2d 971 (1985). While the Commission is free to change its view of what the public interest requires, the Court has reminded it that it must explain the rationale behind its change of view which must be reasonable. Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971). Here, we are unaware of any intervening facts (Further Notice at n.4) which would suggest that the one-year rule is not working or, as noted above, that there is an unacceptable

turnover rate for new stations granted after a comparative hearing. Moreover, the Further Notice recites only the assumed benefits from an extension of the current rule without any discussion of the countervailing detriments which led the Commission to abolish the three-year rule in 1982. We recognize that the Court has adverted to the current one-year rule in questioning the continued viability of the integration criteria, Bechtel v. FCC, 957 F.2d 873, 880 (D.C. Cir. 1992), but, as discussed below, we believe the Court's suggestion is based on a misconception.

The Commission's original approach of granting a comparative enhancement to applicants promising a three-year service pledge is a far fairer approach and directly addresses any concern that the public benefits assumed to flow from the comparative criteria should be preserved for a longer period. This voluntary approach permits an applicant to assess the very real detriments of such a rule in deciding whether to seek the enhancement and whether to pursue a costly comparative proceeding.

If the Commission does pursue a mandatory approach, it should not apply any new rule in a manner that would upset existing contractual relationships, nor apply it to existing authorizations resulting from settlements of comparative proceedings or to authorizations issued after comparative hearings where the case was decided on the basis of basic qualifications rather than comparative issues. In short, any more restrictive rule should be applied only to new authorizations where there was specific

reliance on the comparative posture of the winning applicant in reaching a decision.

There also appears to be a fundamental flaw in the proposal set forth in the Further Notice, a flaw which undercuts the stated rationale for preventing the transfer of authorizations for three years. That flaw is that the ban on transfers does not require maintenance of the winner's comparative proposal for any period whatsoever. No rule currently requires a winning applicant to maintain its comparative proposal for even a single year. Section 73.1620 only requires certain permittees[1] to report any changes in their integration or diversification proposals, it does not require them to maintain those proposals. The stated purpose of this rule is merely to give the Commission an opportunity to determine whether any changes suggest that the initial proposals constituted a misrepresentation.[2] Accordingly, an applicant receiving a grant based upon a diversification preference would be perfectly free to negotiate for and acquire a new station in the same market, a circumstance which would have been almost certainly fatal in a comparative hearing. Similarly, after obtaining a

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1 The rule applies only to those holding permits as a result of a settlement or a decision after comparative consideration. Accordingly, it would not appear to apply where the winner was selected because of the disqualification of its opponents. Comparative Hearing Process (Reconsideration), 69 RR 2d 167, 172 (1991). Why then should a three-year holding period be applied to such authorizations?

2 Comparative Hearing Process, 68 RR 2d 945, 952 (1990). We are unaware of any occasion since its adoption when this provision was invoked to question a change in a licensee's comparative proposal. This also raises questions about the need for strengthening the rule.

grant based upon an integration preference, if a principal was offered an opportunity about which he had no knowledge during the course of the proceeding and it was significantly better than his position managing a station in a particular market, it is difficult to see how this would suggest that his original representations were false, but nevertheless the public would no longer have the benefit of his integrated presence.

It seems obvious from these examples that no purpose would be served by imposing a three-year holding period without a companion requirement that the comparative proposal be maintained for three years.[3] Yet the Further Notice is clear that the only modification of Section 73.1620 now contemplated is "a change in the number and timing of the reports to be made...." To convert Section 73.1620 to a substantive rule requiring maintenance of the winning applicant's comparative position would require issuance of another Notice of Proposed Rulemaking. Adoption of the pending proposal would reimpose on this class of authorizations all of the detriments which led the FCC to abolish the three-year trafficking rule in the first instance without assuring the realization of the public interests benefits the Commission now assumes would flow from the proposed new rules.

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[3] To require applicants to maintain their comparative proposals for a full three-year period would in many situations amount to FCC-enforced indentured servitude. There is simply no way that requiring a person to carry out a function or perform responsibilities which they do not wish to perform is going to be of meaningful benefit to the public.

II. ADOPTION OF THE NEW RULES WOULD HAVE EFFECTS UNMENTIONED IN THE FURTHER NOTICE WHICH WOULD UNDERCUT THE FCC'S PRIMARY GOAL OF ASSURING SERVICE TO THE PUBLIC

In considering the Commission's proposals it is important to keep in mind where they fit into the total regulatory scheme. First, in allocating a frequency, the Commission can give no consideration to the characteristics of the possible operator on that frequency since that person is then unknown. The FCC's sole focus is the desirability of providing a new broadcast service to the public. If there is only one applicant, the Commission does not examine anything other than that applicant's basic qualifications. Whether it owns ten stations in the same state, is a minority, or proposes no integration is of no consequence so long as the applicant is in compliance with the Commission's rules. It is only in the event of competing applications for a newly allocated channel or a license renewal that the Commission considers arguments about applicants' comparative characteristics in deciding to whom to award the authorization and even then, in the event of a settlement, the Commission drops all consideration of the parties' comparative positions and examines only the proposed permittee's basic qualifications. Indeed, while the comparative criteria have a long history of use in deciding contested cases, it is doubtful that the First Amendment would permit the Commission to limit the award of authorizations in non-comparative proceedings to applicants which have no other media interests, or are minority-controlled or are local and propose to be integrated.

Moreover, whether there is a one-year holding period or a three-year holding period or no holding period, the simple fact is

that eventually the broadcast license will be freely transferable and may in fact be transferred to another owner whose comparative characteristics are not reviewable by the Commission. 47 C.F.R. § 310(b). Thus, the comparative criteria have a relatively modest role to play in the overall public interest goal of providing service to the public.

The desirability of adopting the proposed rule modifications to enhance those criteria should be evaluated in light of the adverse effects which necessarily accompany them. In abolishing the previous three-year rule, the Commission made public interest findings which are not even mentioned in the Further Notice. In that earlier proceeding, the Commission found that the public interest would be better served by a buyer who would be more likely to deliver services desired by the audience than by a current owner unwilling or unable to continue station operations. Transfer of Broadcast Facilities, 52 RR 2d 1081, 1087 (1982). As the Commission found: "certainly the public is ill-served by forcing a licensee who is unwilling or unable to continue operation of the station to struggle along until three years have elapsed." Id. at 1088. Yet this is exactly what the Commission now proposes. There are, moreover, other adverse effects from this proposal which undercut the Commission's primary goal of increasing service to the public.

A. The Proposed Rules Would Hinder Settlements

In deciding whether to settle a case, parties always give consideration to the regulations which would affect them. A party might well be willing to engage in a fairly expensive settlement

if it knew that it had the flexibility of being able to recoup its investment after a year if the project was not as successful as anticipated. The same party might be most unwilling to incur the expense of a settlement if it would be required to retain and operate the station for three years even if the station was less successful than anticipated.

The proposal may also impede settlements by depriving parties of outside financing sources where those sources would provide the needed funds in return for an equity interest or option to acquire control in the future. Very often the cost of settlement requires addition of a new investor which would undercut an applicant's original integration proposal. By requiring maintenance of the integration proposal in settlement cases, the Commission might preclude settlement. In another situation, RSSM has represented an applicant which had negotiated a settlement but the limited partner upon whom it was relying for funding decided that his personal situation did not warrant advancing the additional funds needed for a settlement. It proved impossible to arrange conventional bank financing, and ultimately it was necessary to rely on another investor who required an option to acquire the station in return for assuming funding responsibility. This enabled the station to be put on the air while the alternative would have been years of litigation. It is unlikely that the investor in this instance would have been willing to wait three years before he had the right to exercise the option.

In another case an RSSM client is currently trying to settle a case which has been in litigation for many years, but the

expenses of the parties are now so high that outside investor financing would be required for anyone to settle it, and the price of such financing would certainly be an equity interest probably also with an option allowing the new investor to assume control after a specified period. While an investor may not decide to take control for many years, if ever, a rule precluding him from taking control to protect his investment for three years will in many cases prevent the investment altogether. The proposed rule thus appears to conflict directly with the FCC policy favoring settlements, and it would be particularly unfortunate to impose any new rule on existing proceedings where settlement remains a possibility.[4]

B. The Proposed Rule Would Impair the Ability of Permittees To Arrange Financing

The proposed rules may also have a devastating impact on arrangements for the activation of stations. Because the Commission has authorized so many new stations over the last several years at a time when individual station values have been plummeting (due in no small part to the influx of so many additional stations), a financing technique of last resort for new stations has been to obtain funds for construction and initial operating capital in return for a minority interest and an option to acquire the radio station.[5] While successful applicants

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[4] We note that in adopting the current settlement rules the Commission provided an ample grace period to accommodate the settlement of pending cases under the prior rules. Comparative Hearing process, 68 RR 2d 944, 959 (1990).

[5] Investment bankers typically require a majority of the equity and potential control in return for their funds.

typically would prefer to put a station on the air and operate it themselves to assess its profitability and potential, there have been and will continue to be instances where expectations as to the availability of funds for construction and operation will be unrealized due to changed market conditions and revised lending criteria during the often lengthy interval between applying for a new station and the award of a grant. To impose a three-year holding period in such circumstances would almost certainly deprive new permittees of the type of last resort financing discussed above. This in turn could ultimately deprive the public of service even after the tremendous expenditure of both private and public resources attendant upon the comparative hearing process. As an example, another RSSM client settled a case for a new UHF television station but despite extensive efforts it was unable to arrange conventional financing due to changes in the market during the years the case was in litigation. As a result it was forced to locate an investor which agreed to advance the construction funds and additional funds to clean up accumulated debts in return for an option to acquire the station. That arrangement was approved by the FCC, the station was put on the air and the option ultimately was exercised. As the alternative was to turn in the construction permit, it is likely that the public would not have today the benefit of service from that station had the proposed rules been in effect.

The proposed rules might also make it impossible for new stations to use LMAs as those arrangements will often be inconsistent with integration proposals and typically would also be

inconsistent with the diversification criteria where the broker is another local station. We have also represented a broadcast client which settled a comparative case[6] but determined that the poor FM market required it to reduce expenses by entering into an LMA. Doing so affected the integration proposal because the limited management required of a station subject to an LMA did not warrant the full-time participation of the proposed integrated principal. Had the proposed rules been in effect and construed to prohibit LMA's, the station probably would not have been activated or, at best, the permit sold. In the latter event, of course, the party which invested its time, energy and resources in obtaining the permit would be limited to recovering its expenses while the buyer would enjoy a bargain purchase and the public still would not benefit from the winning applicant's comparative proposal. In this instance, certainly, the proposed rule would not advance the public interest.

III. THE PROPOSED RULES, IF ADOPTED, SHOULD APPLY ONLY TO NEW APPLICANTS NOT YET DESIGNATED FOR HEARING

A fundamental question in this proceeding is to whom any new rules should apply. The Commission's Further Notice proposes to apply the new rules to all existing and future authorizations. This would extend the scope of the rules far beyond new applicants, to cases already in the midst of hearing where settlement under the proposed rules may prove impossible, to proceedings where there has already been a settlement which would

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6 The case was settled prior to the current rules' effective date so the Ruarch policy still applied.

be adversely affected or even overturned by the proposed three-year holding period, to authorizations already operating which were financed pursuant to contracts which would not conform to the new rules, and to other situations where contractual arrangements are in place or contemplated which would be upset by a change in the rules.

The applicability of any new rule should take into account its purpose. As we read the Commission's Notice, the primary purpose is to provide more substance to its reliance on the comparative criteria in awarding a license. Secondarily, the FCC expects that such a rule would discourage "insincere proposals." Further Notice at ¶ 10.

These rationales would not appear relevant to cases where authorizations have already been granted, where the parties have settled or where the Commission has not relied upon the comparative characteristics of an applicant in awarding a license. In these circumstances, the integrity of the comparative criteria is not at issue since the comparative process has been completed or the authorization was granted without reference to those criteria.

Nor is a new rule needed to discourage speculative proposals. The comparative cases decided by the Commission frequently turn on integration and that criteria is one of the most fiercely litigated during comparative proceedings. Any intent not to carry out the proposal or an inability to complete such a proposal, typically would be brought to light during the comparative process. In addition, the new settlement rules, which limit

settlement payments to reimbursement of expenses, should eliminate most speculation from the comparative process.

It is difficult, therefore, to perceive any reason why existing permittees or those who obtain permits without reference to their comparative status should have less freedom with respect to the future disposition of a license than any other broadcaster. If it is generally in the public interest for broadcasters to be able to freely convey broadcast stations, there should be some strong and specific rationale before limiting that right for new stations. We do not believe the Further Notice has set forth any such basis. As noted above, moreover, the proposed rules would restrict transferability without assuring that comparative proposals were carried out unless Section 73.1620 also is modified in a manner beyond the scope of this Further Notice.

The most egregiously unfair aspect of the Commission's proposal, however, is that it apparently would apply to permittees or licensees who have already entered into contractual arrangements or obtained investments which are perfectly legitimate under current law but inconsistent with the proposed rules. At a minimum, the Commission should "grandfather" any such arrangements in place as of the effective date of the new rules. Doing so would have minimal impact on the objectives the Commission would seek to advance through the rule since imposing a three-year holding period on granted applications would not have any impact on the comparative process which would have been completed or deter "insincere" proposals. Under these circumstances retroactive application of a new three-year rule to existing

authorizations and contracts would plainly be unreasonable and unlawful, National Association of Independent Television Producers and Distributors v. FCC, 502 F.2d 249, 255 (2nd Cir. 1974); General Telephone Co. of the Southwest v. U.S., 449 F.2d 846, 863-64 (5th Cir. 1971).

IV. MODIFICATION OF THE ONE-YEAR PERIOD IN SECTIONS 73.3597 AND 73.1620 OF THE RULES IS NOT JUSTIFIED

On the substance of the proposed rule, the Commission has frankly acknowledged (Further Notice at n.4) that no empirical data has been presented which would indicate a need for its adoption. Although it requested parties to present such empirical data, we note that the information is all contained in the Commission's own files.

In deciding whether a one-year or three-year period is appropriate, the Commission previously struck a balance saying that the overall desirability of allowing unfettered transfer of broadcast properties as the marketplace dictated would be modified with respect to authorizations granted through the comparative hearing to specify a one-year holding period. The imposition of a one-year holding period does not, of course, require any party to sell the station after one year but only precludes it from selling it prior to one year, unless it can demonstrate good cause. The Court in Bechtel seems to have ignored this distinction and assumed that winning parties would automatically sell at the

expiration of the one-year period. There is no evidence supporting such an assumption.[7]

The one-year period currently specified in Section 73.1620 also appears to be an appropriate period for assessing whether a party's comparative proposal was made in good faith. As time passes, intervening events would make it very difficult to establish that a change reflected a misrepresentation in the original proposal.

In any event, the Commission should expect a significant number of transfers involving new stations since most of the new radio stations being activated are for lower power facilities in either already well-served markets or very small markets. Such circumstances generally lead to a longer developmental period before positive cash flow with resultant strain on the initial investors who may deem it better to sell the station rather than devote more resources to it. The fact that new stations may transfer more frequently does not suggest that the public interest

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[7] Indeed, there are many cases where comparative proposals have been implemented. In Flint Metro Mass Media, Inc. a minority built and operated his proposed station in Flint, Michigan. In V.O.B., Inc., 68 RR 2d 652 (Rev. Bd. 1990), a couple from Detroit obtained a station in Ankeny, Iowa which they have activated and are now running. Jane E. Newman applied for a new station in Hampton, New Hampshire which, after a settlement, she is now operating. These are the real answer to the Court in Bechtel.

In each of these cases the permit was ultimately awarded pursuant to a settlement prior to the new rules when the Ruarch policy was still in effect. In the first two cases, settlements were reached only after extensive litigation and appeal. In our experience, the vast majority of cases settle and we see no need to make such settlements more difficult by imposing a three-year holding period.

is not being served. It has already been served by the activation of the station, and it is difficult to see how the public would be better served by a licensee who desires to exit the market, regardless of his comparative characteristics, than by another entity eager to enter the market, or by maintenance of an underfinanced second-rate service where the public could have the benefit of a well-capitalized first-rate service upon a sale. The simple fact is that having operated now since 1982 without restrictions on the free transferability of broadcast stations, there has been no indication that the quality of service to the public has been adversely affected by elimination of the three-year rule.

V. CONCLUSION

For the foregoing reasons we respectfully submit that the Commission, at most, should revert to its original proposal and rather than require a three-year holding period, permit applicants who wish an enhanced comparative advantage to freely propose maintenance of their proposal for that period. How the Commission would be able to police this and how much effort would be required to handle requests for waiver of the rule, of which there are certain to be many, are matters the Commission might consider in deciding whether it is worthwhile to proceed.

As we have noted, there is little empirical evidence of a need for the proposed rule other than a perceived need to satisfy the Court in Bechtel and the rule seems directly counter to the Commission's public interest assessment in eliminating the

previous three-year rule. This together with the problems the proposal creates for settling pending cases and for financing new stations, overshadows any supposed public interest benefits which might be obtained. Finally, imposing the proposed rule to existing authorizations and contractual arrangements would be plainly unfair and would serve no legitimate purpose. Such retroactivity could be justified only by some strong public interest consideration clearly outweighing the harm caused. No such consideration exists. Accordingly, the Commission should apply any more restrictive new rules only to new applications or those not yet designated for hearing.

Respectfully submitted,

REED SMITH SHAW & McCLAY

By: James J. Freeman

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Washington, D.C. 20036
(202) 457-6100

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